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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 205

UNITED STATES OF AMERICA, EX REL. ANASTASIOS HINTOPOULOS AND ELIZABETH HINTOPOULOS, PETITIONERS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 16–27) are reported at 238 F. 2d 705. The opinion of the District Court for the Southern District of New York (R. 2–6) is reported at 133 F. Supp. 433.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1956 (R. 27). The petition for a writ of certiorari was filed on June 27, 1956, and was granted on October 8, 1956 (R. 28). 352 U. S. 819.

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in denying petitioners' applications for suspension of deportation governed by the Immigration Act of 1917, the Board of Immigration Appeals properly exercised the discretion granted by that Act or acted improperly in referring to the policy governing the disposition of applications under the 1952 Act.

STATUTES INVOLVED

Section 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, c. 439 (54 Stat. 671, 672), the Act of December 8, 1942, c. 697 (56 Stat. 1044), and the Act of July 1, 1948, c. 783 (62 Stat. 1206), 8 U. S. C. (1946 ed., Supp. V) 155 (c) provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is

residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien

was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided*, That no quota shall be reduced by more than 50 per centum in any fiscal year.[1]

[1] The corresponding sections of the Immigration and Nationality Act of 1952, Sections 244 (a) (5), (c) and (d), 66 Stat. 214–216, 8 U. S. C. 1254 (a) (5), (c) and (d), provide:

"SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * * *

"(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * *

"(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5)

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. 1101, note, provides:

> SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought * * * at the time this Act shall take effect;

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of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

"(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year."

> but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended * * * which is pending on the date of enactment of this Act [June 27, 1952] shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

This is a habeas corpus proceeding to test the validity of an order of the Board of Immigration Appeals denying petitioners' requests for suspension of deportation under the provisions of Section 19 (c) of the Immigration Act of 1917 (*Supra*, pp. 2–4). The facts, which are undisputed, are as follows:

Petitioners, who are husband and wife, are aliens[2] who entered this country legally, but for a limited stay, as seamen, the wife in July 1951, and the husband in August of the same year (R. 9–10). The wife testified at one point that she knew she was pregnant at the time of her admission and wished to remain until her child was born. Later, she stated that at the time of her entry she intended to be examined by a doctor to determine whether she could continue at sea. She stated she intended to follow

[2] The hearing officer determined that both aliens were Greek citizens (R. 7). The Board of Immigration Appeals found the husband to be Greek and the wife a subject of the Soviet Union (R. 11–12). The court below refers to them as Greek (R. 17), as do petitioners in their brief (Pet. Br. 5). The nationality of the petitioners is not material to the issues before this Court.

the doctor's advice as to the length of time she should remain in the United States (R. 8). Her husband stated that he left the ship on a later trip because of his wife's illness, with the intent to remain with her until she recovered (R. 7–8). Without making applications for extensions, both aliens overstayed the time permitted them, that is, the time the ship remained in port but not over 29 days.

In November 1951, their child was born in the United States and is a citizen of the United States. In January 1952, petitioners disclosed their presence here to the authorities by filing an application with the New York office of the Immigration and Naturalization Service seeking suspension of deportation (R. 9). Deportation proceedings were instituted in May 1952, and a hearing was held to determine whether petitioners were deportable and if so whether deportation should be suspended in accordance with their applications under Section 19 (c).

On the undisputed facts, both aliens were found deportable and that finding has never been challenged (R. 10). On the issue of suspension of deportation, the hearing officer first noted the fact that the aliens were of good moral character and that their child, a citizen of the United States, would suffer an economic hardship if his parents were deported (R. 8–9). The father was earning $64 a week here (R. 9) and could expect to earn only $85 a month if deported (R. 13). In spite of the fact that the aliens fulfilled the statutory conditions of eligibility for suspension, the hearing officer concluded that, on the facts of the case, discretionary relief should not be

In affirming the dismissal of the writ of habeas corpus by the district court, the court of appeals held that the reference to the 1952 Act by the Board of Immigration Appeals did not mean that the Board felt that the scope of its discretionary power was restricted by the Act, but rather that it was appropriate for it to consider the policy of that Act in exercising its discretion (R. 21). Judge Frank dissented, stating that the reference of the Board to the Congressional intent in passing the Immigration and Nationality Act of 1952 introduced an improper basis for denying suspension since the savings clause of the 1952 Act required that the Board's exercise of discretion be governed by the 1917 Act (R. 23–26).

SUMMARY OF ARGUMENT

Without contesting the fact that they were subject to deportation, petitioners sought through habeas corpus to test the validity of orders denying their applications for suspension of deportation. The hearing officer and the Board of Immigration Appeals refused to suspend deportation on the grounds that, although petitioners fell within the class as to whom Congress permitted suspension, they had not established facts which were persuasive that the discretion to give that relief should be exercised. Petitioners attack that order on the grounds: that, under the applicable law, the Attorney General was required to suspend deportation; that there was either a refusal to exercise or an abuse of discretion; and that the Board improperly relied on the standards applicable to the 1952 statute when the case was governed

by the 1917 Act. Both courts below refused to reverse the administrative decision.

I

Petitioners argue that the word "may" in the statute—referring to the authority to grant suspension of deportation—means "shall" when an economic detriment to an American citizen is involved. But in the same statute Congress has used "may" and "shall" discriminatingly to mean either permissive or compulsive action. The testimony before the Congressional hearings, the debates, and the reports all indicate that discretion was granted. The lower courts have always so assumed, and this Court in *Jay* v. *Boyd,* 351 U. S. 345, 353, has suggested that the discretionary element, which is undoubtedly incorporated in the 1952 Act, is not a change in substance from the earlier law. It therefore appears certain that petitioners had no *right* to suspension, but only the right to have the Board of Immigration Appeals exercise its discretion in considering their applications.

II

The opinions of the hearing officer and of the Board of Immigration Appeals show that both did in fact give full consideration to the undisputed facts in the case. Petitioners are man and wife who were serving as seamen at the time of entry. The wife was pregnant and landed to see her doctor; she then stayed. The husband overstayed his leave on the next trip. The baby, an American citizen by birth, was born six months after, and two months later petitioners made

application for suspension of deportation. The prime consideration in denying relief was that the family had really not established roots in this country so that it would be unfair to permit them to remain, thus deducting from the Greek quota the chance for two immigration visas otherwise available for aliens who sought to comply with our law. The courts below, quite properly, we submit, held that there was no abuse of discretion.

III

Although there is no dispute that the 1917 Act governed these applications, and although the administrative action was clearly predicated on that Act, the dissenting judge in the court below and petitioners find a defect in the Board's action in that in the exercise of its discretion it made reference to the policy enunciated by Congress for administration of the 1952 Act. The district court and the majority of the court below found that such reference was not improper since Congress must have intended the discretion to be exercised in the light of conditions existing at the time action was taken, rather than on the basis of history. Strong support for this position is to be found in the fact that administrative action on applications for suspension of deportation is subject to Congressional review and it would be a futile absurdity for the Attorney General to disregard current Congressional opinion. Basically, the Board of Immigration Appeals accepted the direction of Congress as laid down in the 1917 Act but applied it with consideration of the present circumstances. This, we submit, was not error.

ARGUMENT

This case involves two admittedly deportable aliens who are challenging the administrative denial to them of the privilege of suspension of deportation, a privilege which this Court has recently compared to those of probation and suspension of sentence in criminal cases, the grant of which comes, not as a matter of right, but as an act of grace. *Jay* v. *Boyd*, 351 U. S. 345, 354. Judicial review of this administrative decision is confined to the narrow issues of whether there has been either an abuse of discretion, a total failure to exercise the discretion granted, or the application of a mistaken standard in the exercise of discretion. See *e. g., United States ex rel. Bruno* v. *Sweet*, 235 F. 2d 801, 804–805 (C. A. 8); *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45 (C. A. D. C.); *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519, 520 (C. A. 2), certiorari denied, 345 U. S. 969; *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372 (C. A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490–491 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 373 (C. A. 2), certiorari denied, 333 U. S. 876.

Petitioners argue (1) that, as to aliens within the class as to whom suspension of deportation may be granted, it must be granted if deportation would result in a serious economic detriment to a citizen who is a minor child of the alien (Pet. Br. 20–25); (2) that there was no evidence to support an exercise of discretion against suspension (Pet. Br. 14–20); and (3) that improper reliance was placed on the policy of the 1952 Act which was not applicable to petitioners'

applications governed by the 1917 Act (Pet. Br. 12–14).

I. The statute gives the Attorney General discretionary power to grant or refuse suspension of deportation to aliens in the prescribed class.

Since in this case the deportation proceedings and the applications for suspension in connection therewith preceded the Immigration and Nationality Act of 1952, having been commenced in May 1952, the Savings Clause of that Act (Section 405, 8 U. S. C. 1101, *supra*, pp. 5–6) reserves to the petitioners the right to proceed under the earlier statute. Specifically, an application for suspension is designated as a proceeding under that section. Therefore, there is no dispute that section 19 (c) of the Immigration Act of 1917 (as amended) (*supra*, pp. 2–4) controls.

It is also not in dispute that the authority vested in the Attorney General by section 19 (c) has been validly delegated to the Board of Immigration Appeals so that, so far as this case is concerned, orders issued by the Board have the same legal effect as though they have been issued by the Attorney General. 8 C. F. R., 1949 ed., sec. 90.3 (c). *Accardi* v. *Shaughnessy*, 347 U. S. 260, 266.

Prior to 1940, the immigration laws contained no provision for relief in the case of a deportable alien. Unless Congress passed a private relief bill on his behalf, a deportable alien, however deserving, was required under the law to be expelled. Then in 1940 the Alien Registration Act (54 Stat. 670, 672) added section 19 (c) to the Immigration Act of 1917 providing for suspension of deportation. As amended in 1942 and 1948 in respects which are immaterial

met the prerequisites for inclusion in the class to whom suspension was available. Furthermore, the standard applied ("serious economic detriment") was that set forth in the earlier Act. Unless the Attorney General's discretion was to be based on historical accident, rather than on current developments, there was no departure from the provisions of the earlier law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

ISABELLE R. CAPPELLO,
Attorney.

JANUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

here, this statute provided in pertinent part, 8 U. S. C., (1946 ed., Supp. V), 155 (c):

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act [July 1, 1948].

The statute went on to provide that, if the deportation of an alien was suspended for more than six months, the pertinent facts and law were to be reported in detail to Congress. Deportation would be canceled unless Congress passed a concurrent resolution stating in substance that it did not favor the suspension of deportation.[3]

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[3] In 1942, Congress made a change in the date when the Attorney General was required to report any grant of suspension. 56 Stat. 1044.

In 1948, Congress enlarged the class of deportable aliens eligible for suspension of deportation in the discretion of the Attorney General to include those who had resided continuously in the United States for seven years or more upon the effective date of the enactment and certain aliens theretofore ineligible by reason of race. It also changed the procedure of congressional confirmation of the action of the Attorney General in cases in which he suspended deportation for more than 6 months by requiring affirmative congressional action before deportation proceedings could be finally canceled (*supra*, p. 3). 62 Stat. 1206. However, the discretion of the Attorney General was left unchanged in these subsequent amendments to the 1940 addition.

In construing the comparable provision of the 1952 Act (Section 244 (a) (5), 8 U. S. C. 1254 (a) (5), *supra*, p. 4), this Court recognized that under that statute the determination of whether to suspend was left to the sound discretion of the Attorney General, *Jay* v. *Boyd*, 351 U. S. 345, 353, and that the 1952 Act differed from its predecessor in this respect only in that the later statute was more specific in making the grant discretionary. *Id.* p. 353, fn. 15. As we point out below (*infra*, pp. 18–20), the courts have consistently interpreted the 1917 Act as giving the Attorney General discretion. However, petitioners argue that the word "*may* * * * suspend deportation * * *" should be read as "*shall* * * * suspend deportation * * *" (Pet. Br. 21–22).

The choice of the word "may" in section 19 (c), vesting this authority in the Attorney General, is in itself an indication that Congress did not intend that the grant of suspension should be automatic in the case of aliens of good moral character whose deportation would result in the defined hardship. The mandatory language "shall" was used liberally throughout section 19 (c) when Congress did not wish to leave action to the discretion of the Attorney General.[4]

[4] For example, section 19 (c) (*supra*, pp. 2–4) provided that: in the event deportation was suspended by the Attorney General for more than six months "* * * a complete and detailed statement of the facts and pertinent provisions of law in the case *shall* be reported to the Congress with the reasons for such suspension * * *"; in the event that Congress passed, within a certain time, a concurrent resolution favoring such suspension, "* * * the Attorney General *shall* cancel deportation proceedings * * *"; in the event that Congress did not pass such a concurrent resolution, "* * * the Attorney General *shall* thereupon deport such alien * * *." [Italics added.]

The legislative history supports the conclusion that the choice of the permissive word "may," rather than the mandatory word "shall," was not a matter of chance. A House Report in 1934, on an earlier draft of legislation to provide for suspension of deportation, states:

> It will be observed that *even if the alien qualifies* under one of the six classes enumerated *favorable action is left to the discretion of the Secretary of Labor* [then in charge of these matters]. * * * [Italics added.] H. Rep. 1772, Part 2, 73rd Cong., 2d Sess. (1934), p. 3.

Mr. Hobbs, the House Manager of the 1940 bill, in explaining to Mr. Celler the provision made for hardship cases, stated (86 Cong. Rec. 9032 (1940)):

> These so-called hardship cases are taken care of in this way. Any alien who is illegally in this country is given a chance to convince the Attorney General that there would be an economic loss to a citizen of the United States if he should be deported. *Then, if and when he shows, to the satisfaction of the Attorney General that that is so,* that he has a wife—or in the case of a woman, a husband—who will suffer by reason of the deportation, *the Attorney General may, if, in his sound discretion,* after full hearing, he so determines, *order the suspension* or cancelation of the deportation order; provided, however, that he must report every case to the Congress; and if the Congress, by concurrent resolution, vetoes his decision, of course the deportation order stands. [Italics added.]

Congressional comment since the addition in 1940 of section 19 (c) to the Immigration Act of 1917 shows that it has consistently been the thought of Congress that suspension of deportation under section 19 (c) was not to be automatic, even in the case of aliens who met the statutory qualifications, but discretionary with the Attorney General.

In 1947, when a congressional committee was considering proposed amendments to the suspension statute, the whole understanding of very broad discretion was openly laid before the committee by Mr. Shaughnessy, special assistant to the Commissioner on Immigration and Naturalization, Department of Justice. He stated:[5]

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.

In its study of the laws preparatory to the 1952 revision of the immigration and naturalization laws, the Senate Judiciary Committee stated (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the former eligibility requirements does not necessitate a conclusion that he will be granted suspension of deportation. * * *

Following the plain mandate of the statutory language and history, the courts have consistently recognized that suspension of deportation was

[5] Hearings before the Subcommittee on Immigration and Naturalization of the House Judiciary Committee, 80th Cong., 1st Sess., on H. R. 245, H. R. 671, H. R. 1115 and H. R. 2933 (1947), p. 35.

intended to be a matter of executive grace, subject at most to very limited judicial review for failure to exercise discretion or for misconception of the applicable law. As stated by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (C. A. 2), the "power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." Similarly, in *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2), it was held: "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion." And in *Sleddens* v. *Shaughnessy,* 177 F. 2d 363, 364 (C. A. 2), the court held that the "relator's claim in the habeas corpus proceedings that he was entitled to suspension of deportation was properly held to be without merit because such suspension was a matter of discretion on the part of the Attorney General which the court was without power to review." See also *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *United States ex rel. Walther* v. *District Director of Immigration and Naturalization,* 175 F. 2d 693, 694 (C. A. 2); *United States ex rel. Zeller* v. *Watkins,* 167 F. 2d 279, 282 (C. A. 2); *United States ex rel. Baetsch* v. *Watkins,*

175 F. 2d 245, 247 (C. A. 2); *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3).

II. On the admitted facts of this case there was no failure to exercise, or abuse of, discretion in the denial of suspension.

We turn now to a consideration of the facts of this case to determine whether the broad discretion of the Attorney General under section 19 (c) of the 1917 Act was either not exercised or abused, as alleged by petitioners (Pet. Br. 12–20).

It is clear from a reading of the decisions of the hearing officer and the Board of Immigration Appeals that they did consider the facts and circumstances of these particular cases and based their decisions upon such consideration (R. 7–16). The hearing officer discussed at length the facts of petitioners' cases (R. 7–9). The Board of Immigration Appeals did likewise and so stated (R. 14):

> * * * We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case * * *.

In its later decision of May 5th, the Board referred to its earlier decision of March 18th and stated (R. 15, 16):

> * * * After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. * * *

> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied. * * *

The decision of the Board of Immigration Appeals in petitioners' cases is in marked contrast to that involved in *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2), cited by the dissenting judge below (R. 24) and petitioners (Pet. Br. 24). In that case the Board of Immigration Appeals did not exercise its discretion at all, but said it was bound by the Attorney General's decision in another case involving a similar factual situation of an Italian alien whose eligibility for suspension of deportation was due to continued residence here resulting from inability to enforce his deportaton order to Italy during the pendency of World War II. The Court of Appeals in *Mastrapasqua* remanded the case with directions to the District Court to order the release of Mastrapasqua unless, within a reasonable time, the Immigration and Naturalization Service or the Board of Immigration Appeals exercised its own discretion on the particular facts of that case.

The hearing officer here based his decision on the fact that petitioners had not established in this country roots or ties which they would have to break if deported, and had presented no special circumstances, other than the fact of the birth of their son, which would warrant extending to them the privilege of remaining. While this birth gave them an eligibility for the relief of suspension, the hearing officer did not

consider it alone to be sufficient reason to permit them to stay, in derogation of the rights of others from Greece who have been patiently waiting in line for their turn to enter this country.[6] Cf. *Melachrinos* v. *Brownell*, 230 F. 2d 42, 44–45 (C. A. D. C.). The hearing officer also noted that petitioners did not report their presence in the United States until after the birth of their child gave them a foothold in this country. All of these considerations are reasonable and relevant in view of the discretionary and gratuitous nature of the relief sought.

In reviewing the decision of the hearing officer, the Board of Immigration Appeals also noted that petitioners did not seek to obtain an extension of their period of stay as seamen, although their testimony showed they intended to stay for an indefinite period when they left their ships (R. 12.) The Board took account of the facts that they had been in this country for a period of less than three years, and had no close family ties or any dependents other than their child of the age of two and one-half years (R. 13). It commented upon the fact that the male petitioner could possibly obtain work as a Greek seaman for about $85 monthly. Noting that the granting or withhold-

[6] The Immigration Act of 1917, as amended (*supra*, pp. 3–4), provided that, upon cancellation of deportation of any alien under the provisions for suspension of deportation, the immigration quota of his country should be reduced by one for that year or the next following year in which a quota was available (provided that no quota be reduced by more than 50 per centum in any fiscal year). Petitioners' statement (Pet. Br. 9) that suspension in their case would not adversely affect anyone is in error; we are informed by the State Department that cancellations of deportation orders relating to Greek aliens may be charged against the quota for current or upcoming years.

ing of maximum discretionary relief depends on the factors and merits of each individual case (R. 13) and stating that it had "carefully examined the facts and circumstances in the instant case" (R. 14), the Board on March 18, 1954, found that the granting of maximum relief to petitioners was "* * * not warranted by the record * * *" and dismissed the appeals (R. 14). These were the same considerations relied upon by the hearing officer, and, as we have already commented (*supra*, pp. 21–22), were both reasonable and relevant to the nature of the relief sought.

Although each case stands on its own facts, it is significant that the absence of "roots" in this country was upheld as a basis for the exercise of discretion against suspension in *Melachrinos* v. *Brownell*, 230 F. 2d 42 (C. A. D. C.), where the court stated at 44:

> It seems to us that one element to be determined by the Attorney General in weighing the question as to whether or not his discretion should be exercised is whether, if at all, the alien has during his residence here become a part of this country, with his roots firmly fixed herein. Mere residence and good moral character alone may not be sufficient.

Petitioners cite cases from the files of the Immigration and Naturalization Service in which suspension was allowed by the Board (Pet. 14–17). All

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[7] Meeting a similar argument advanced in *Acqaidi* v. *Shaughnessy*, 347 U. S. 260, this Court disposed of it in a footnote at page 264 as follows:

"The first ground was that 'in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion.' This is a wholly frivolous contention, adequately disposed of by the Court of Appeals."

but two of these are the same cases cited in footnotes 17 to 22 of Senate Report 1515 (81st Cong., 2d Sess., p. 597) as examples of the interpretation given to the term "serious economic detriment" contained in section 19 (c) to determine if the aliens were eligible for the relief sought thereunder. The files of those cases which we have been able to obtain reveal additional factors of long residence, family ties, or economic distress to numerous dependent American citizens, that are not present here, and which account for the grant of suspension accorded in those cases:

In the case of Emilio Consigliero, immigration file number A-2146468, decided by the Board on June 11, 1947, the alien involved had been in this country for seven years, had married a native-born American citizen, and had two children born here.

In the case of Mariangoula T. Tsolainos, immigration file number A-6250408, decided on November 25, 1949, the alien was married to a Greek citizen, who entered this country as a diplomat twenty-five years previously and was a legally resident alien. Her mother and two sisters were in this country, as well as numerous close in-laws.

In the case of William Rybicki, immigration file number 56111/780, decided July 21, 1944, the alien had resided in this country for seventeen years and was married to a naturalized citizen.

In the case of Pedro Palacio, immigration file number 56093/577, decided March 30, 1943, the alien had resided here for a total of 24 years, was married to an American citizen, and had eight children, all American citizens born here.

In the case of Rosario Mendez de Vargas, immigration file number 55930/335, decided March 31, 1943, the alien had resided in this country for fifteen years and had five minor children, all citizens of this country by birth.

In the case of Adela Monterroso Esquivel, immigration file number 56050/380, decided May 15, 1943, the alien had resided in this country for seventeen years and had two American-born children.

All these cases are clearly distinguishable on their facts, but, even if they were not, we submit that there has not here been such an abuse of the "unfettered discretion" (*Jay* v. *Boyd*, 351 U. S. 345, 354) of the Attorney General as to justify the granting of the writ.

III. The reference to the policy underlying the 1952 Act does not invalidate the order made pursuant to the 1917 Act.

As pointed out above (*supra*, p. 14), it is not disputed that the applications for suspension here involved were governed by the provisions of section 19 (c) of the 1917 Act. There was no confusion during the administrative proceedings as to the law which controlled. The denial by the hearing officer was based on an exercise of discretion whereas, if he had considered the 1952 law applicable, he would have had no power to grant suspension since under that law residence often years was a prerequisite.[8] The head-

[8] The eligibility requirements in the 1917 Act were proof of good moral character for the preceding five years and serious economic detriment to a citizen or legally resident alien who was the spouse, parent, or minor child of such deportable alien (*supra*, p. 2). In the 1952 Act these eligibility requirements, as applicable, to

note to the first opinion of the Board of Immigration Appeals refers to the "Act of 1917" (R. 11), and its opinion, like that of the hearing officer, is entirely inconsistent with an application of the 1952 Act. And finally, reliance on the 1917 Act was specific in the Board's opinion on rehearing when it stated (R. 15):

> * * * We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended. * * *

Moreover, the Board considered the "serious economic detriment" to the American citizen, petitioners' infant son (R. 13), which is language quoted from the 1917 Act, rather than "exceptional and extremely unusual hardship", which is the language of the 1952 Act.

The dissenting judge in the court below (R. 24) and petitioners (Pet. Br. 12–14) consider that the Board of Immigration Appeals applied an improper standard by taking into account the Congressional policy underlying the 1952 Act. This argument is

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those aliens who, like petitioners, have remained longer in the United States than the period for which they were admitted, are a physical presence in the United States for a continuous period of not less than ten years; proof of good moral character for that period; and a finding that the alien is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence (*supra*, p. 4).

based on language used by the Board in its disposition of petitioners' application for rehearing. The Board stated (R. 15-16):

> * * * On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244 (a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended.
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> * * * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

The congressional comment referred to was most probably that found in Senate Report No. 1137 which

accompanied the bill that became the 1952 Act (S. Rep. No. 1137, 82nd Cong., 2nd Sess., p. 25):

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To con-

tinue in the pattern existing under the present law is to make a mockery of our immigration system.

Both courts below found the reference to the Congressional policy not to be improper (R. 6, 21–23). It would only be improper if we were to read the original grant of *discretion*—as distinguished from *eligibility* for relief—made in 1940 as being limited to the circumstances then existing, without regard to later developments. We submit it is far more reasonable to assume that Congress intended the Attorney General to administer the law in accordance with developing conditions, particularly as disclosed in subsequent Congressional proceedings. In fact, since the grant of suspension of deportation must under the law be submitted to Congress for approval (*supra*, pp. 3, 5), it would be futile for the Attorney General to disregard current policies of Congress in exercising his discretion. That Congress should have intended to grant the Attorney General "unfettered" discretion (*Jay* v. *Boyd*, 351 U. S. 345, 354), subject to the sole limitation that he might consider everything except those things which Congress should subsequently find to be important, would indeed be a strained construction.

Nor is our view contrary to the provisions of the Savings Clause included in the 1952 Act, Section 405 (a) (*supra*, pp. 5–6). That clause requires that proceedings for suspension commenced before the effective date of the later act continue to be governed by the provisions of the 1917 Act. That was done in this case; otherwise, petitioners could not have